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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480

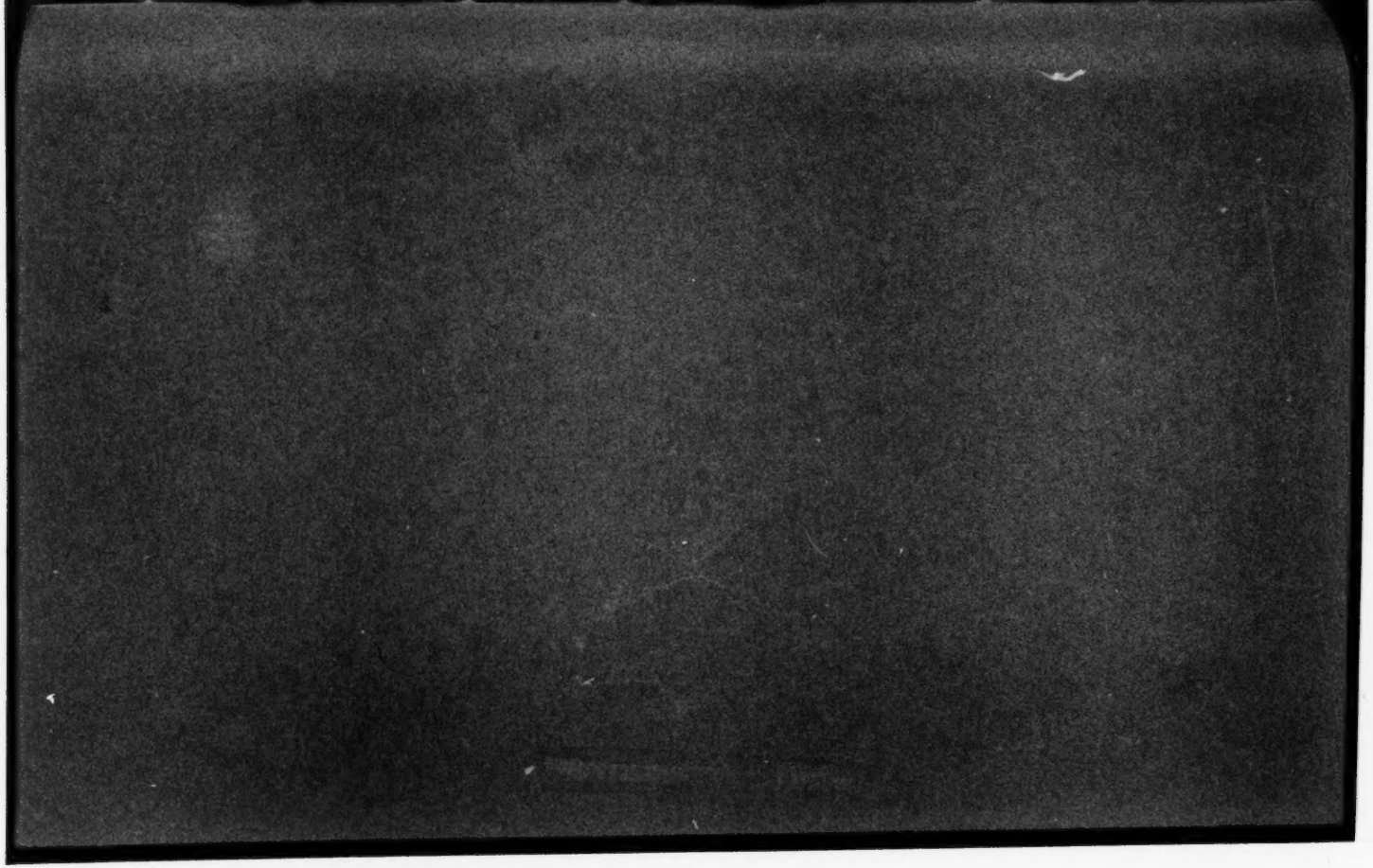
I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, PETITIONERS,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELIZABETH B. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI, SUMMARY STATEMENT AND ASSIGNMENTS OF ERROR.

IRVING B. MELVILLE,
Security Building, Denver Colorado,
Attorney pro se and for other Petitioners.



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PETITION FOR WRIT OF CERTIORARI,

Come now your petitioners and respectfully request that a Writ of Certiorari issue out of this Court to review the final judgment of the supreme court of the State of Colorado in Cause No. 14634, in which your petitioners are plaintiffs in error, and respondents defendants in error—and, for grounds therefor, petitioners assert that petitioners District Landowners Trust and its Trustees have been deprived of their property without due process of law in violation of article five, and that their written contract with respondents has been impaired and set aside, and that they have been deprived of their property without due process of law, and have not been given the equal protection of the law, in violation of section one of article fourteen of the Amendments to the Constitution of the United States; and the petitioners, as individuals and in their respective individual capacities, allege that they, respectively, have been deprived of their personal rights and property in violation of article five and of article fourteen, and each have been denied the equal protection of the laws in violation of article fourteen, of the Amendments to the Constitution of the United States.

Respectfully submitted,

I. B. MELVILLE,
Attorney pro se, and Attorney for the other Petitioners herein named.

STATE OF COLORADO
City and County of Denver } ss.

I. B. Melville of lawful age, being first duly sworn, deposes and says that he is one of the trustee petitioners herein and is the secretary and business manager of petitioner District Landowners Trust, and he is one of the petitioners sued in their individual capacities, and that he has read the above and foregoing petition and knows the contents thereof; and that the matters and things in said petition set forth are true to the best of his knowledge and belief.

I. B. MELVILLE.

Subscribed and sworn to before me this thirtieth day of September, 1940.

A. H. WHITE,
Clerk of the Supreme Court of the
(Seal) State of Colorado.

Filed in cause No. 14634 Colorado Supreme Court, September 30, 1940, for transmission to United States Supreme Court.

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SUMMARY STATEMENT.

This proceeding involves the present and future status of a large contiguous body of arable land practically adjoining the City of Denver, Colorado, and the irrigable portion, comprising about 40,000 acres, since 1926 has received the available surplus water from the City; and, in the future will continue to receive such water under the terms of an irrevocable resolution of its board of water commissioners, if petitioners are successful in this Court

This land comprises The East Denver Municipal Irrigation District, organized under the Colorado laws in 1910 with an authorized statutory bond issue of $3,000,000 for constructing a system of irrigation works including the necessary water for irrigating the land; and, in 1913 Henry L. Doherty & Company of New York City contracted to build such system and furnish the required water for irrigation but before the system was completed in that year a dispute arose with the Reservoir Company furnishing the water, and in the spring of 1914, the Reservoir Company sold the water to the City of Denver; and in December, 1916, a landowners suit was brought against Doherty & Company for the recovery of the bonds obtained by them, which was determined in favor of the landowners in October, 1923.

In the spring of 1924 it became possible to effect a compromise between the then holders of the bonds, the landowners, Doherty & Company, and the Board of Water Commissioners of the City of Denver, as the latter had been enjoined in the spring of 1914 from completing the purchase of the water; and on account of the intricacies and magnitude of the hundreds of matters to be accomplished, it was agreed by all interested parties that it could be accomplished best by a

body of trustees under a trust agreement, as the lands alone had outstanding principal of bonds amounting to $713,500, with unpaid coupons covering a perior of 11 years, unpaid judgments on part thereof amounting to several hundred thousands of dollars, rights of way judgments, warrants, and other indebtedness such as unpaid general and irrigation district taxes, in some instances covering the entire period of litigation—all at that time approximating $40 per acre with additional outstanding unmatured bonds.

Hence in April, 1924, the District Landowners Trust was organized and is governed by a board of five trustees under a Declaration of Trust recorded in the office of the recorder of the various counties in which the system of irrigation works and the lands are located, and the settlements made and the Declaration of Trust were approved by the qualified electors of the District at an election duly called and held on June 21, 1924, and the board of trustees forthwith thereafter took charge of the system of irrigation works and other assets of the District and proceeded to place the then present system in operating condition and to construct additional reservoirs; and assumed and paid all District liabilities, including all outstanding bonds and warrants and judgments, and made written contracts with all owners of land in accordance with the terms and condtiions of said Declaration of Trust, who desired so to do and were willing to pay their respective delinquent general and irrigation district taxes, on an adjusted basis of approximately 18 per cent of the amount owing, and who were willing to give a promissory note in the amount of $20 per acre on the irrigable portions of their land only and secure the same by trust deed—such landowner's land thereafter being free and clear of all other incumbrances including taxes, but subject to future general and irrigation district

taxes in accordance with the irrigation district law of Colorado, the water for irrigation to be received from the board of water commissioners of the City of Denver annually, the first half paid by July 1, and the other one-half by November 1 of each year.

This plan was carried out from the time of the organization of the Trust, except non-resident owners failed to pay their taxes or any part of the interest or principal of their notes beginning with the low prices and the drouth in about 1930 (most of the landowners were non-residents) without any protest, until February 16, 1939, when plaintiffs below, respondents here, filed their complaint in the district court of the City and County of Denver, with a copy of the Declaration of Trust attached thereto and in support thereof, alleging themselves to be owners of land in the District and each an owner of a certificate of beneficial interest, by virtue of which they are beneficiaries of the Trust, and bring this action for thmselves and for the benefit of all other owners of such certificates who may desire to become interested herein; and in material substance allege that the District is dormant and in the future will be unable to operate or to furnish water for irrigating any of the lands, that Melville has all of the books and records of the Trust and has refused access thereto, and for this reason they are not able to more definitely allege many details of mismanagement and conversion and illegal actions; that the Trust was created for a period of 5 years only, at which time the trustees were required to distribute the assets and convey the system of irrigation works with all other property to the beneficiaries, but have not done so and have deliberately and unlawfully prolonged the life of the Trust with intent and for the purpose of securing personal benefit to themselves, their friends, relatives and associates; that they have illegally used trust funds to

improve farms, for purchasing seed and gasoline for the farmers, for erecting buildings, for drilling wells, for guaranteeing debts of others, for cancelling notes, for drilling and equipping irrigation wells, and did not acquire any water for irrigating District lands, for which wrongs plaintiffs have no plain, speedy or adequate remedy at law; and the prayer: (1) The court find and determine the liability of the individual defendants for misappropriation of funds and property of the Trust, and enter a joint and several judgment against them in favor of the Trust; (2) An order be entered converting the Trust assets into cash and distribute the same to the beneficiaries; (3) An order be entered impounding the books of the Trust in the registry of the court pending final determination; (4) An order be entered directing an audit of the books immediately, to the end of determining the liability of the individual defendants; and (5) for general equitable relief.

On the day of filing the complaint, without any hearing and without service of the complaint or summons or notice of any nature to defendants below, petitioners here, on plaintiffs' oral application and pursuant to paragraph 3 of the prayer of the complaint, the court entered an order and caused a citation to be issued against Melville, individually, which was served on the following day, to show cause at 2 o'clock p. m., on February 20, 1939, why an order should not be entered impounding in the registry of the court all of the books and records of the Trust and directing an audit thereof under the supervision of the court; and on that same day a notice was served on all defendant trustees that plaintiffs would apply for an order requiring said trustees to forthwith deliver to said clerk all books and records of the Trust, and for an order directing that an audit be made thereof under the su-

pervision of the court—said notice being attached to a copy of the summons and complaint served at that time.

In the forenoon of said February 20, the motion referred to was reduced to writing and supported by the affidavit of Dick, one of plaintiffs' attorneys, and forthwith affidavits were prepared by the president and by the secretary of the Trust controverting the statements in the Dick affidavit; and on the hearing of the matter at 2 o'clock in the afternoon Melville was called for cross-examination under the statute, and his testimony shows that no necessity for accounting existed, and that the books and records of the Trust always had been and then were open at all reasonable office hours for examination by all persons interested, and filed a written motion to make paragraphs 2, 4-11 of complaint specific, which motion was promptly denied without argument, and an oral demurrer interposed and overruled, although in the Declaration of Trust attached to the complaint, holders of certificates of beneficial interest could not bring an action until the system of irrigation works were completed and all indebtedness incurred by the Trust in connection therewith was paid.

Notwithstanding the above facts, without any testimony or other evidence upon the part of plaintiffs, the court entered an order appointing Ralph W. Mayo & Co., certified public accountants, to take charge of all said books and records and commence and complete such audit as soon as possible and make a report thereof to the court, the expense thereof to be borne by the Trust.

The above orders were carried out, but the court, instead of employing Ralph W. Mayo & Co. as accountants, employed Alexander J. Lindsay & Company, who completed the audit on June 8, 1939.

On July 10, 1939, defendants were served with a notice by plaintiffs that on July 13, 1939, at ten o'clock in the forenoon they would apply for an order for defendants to show cause why a receiver should not be appointed to take charge of and administer the assets of the Trust, in accordance with the prayer of the petition for a receiver thereto attached; a motion to strike portions of the petition, and motions to make the petition more specific, were denied without any argument being allowed, the court remarking that this is a case where a receiver is about the only remedy, and the court thought that a receiver should be appointed, and asked for the suggestion of counsel as to a proper bond in the situation; a demurrer was then filed to the petition, on the ground that the same does not state sufficient facts to constitute a cause for such appointment nor to justify any appointment of a receiver based thereon, which should have been sustained in view of the above mentioned clause in the Declaration of Trust and the fact that the complaint included two distinct causes of action, the one against the trustees and the other against them In their individual capacity, but the demurrer was overruled without argument and defendants given 5 days within which to answer and plaintiffs 24 hours within which to reply, and set the hearing for July 25, 1939; and on the hearing defendants orally objected to plaintiffs proceeding in the case until they made proof that plaintiffs were competent parties, and while the court ruled that the burden was on plaintiffs to make such proof, they were allowed to proceed without so doing and such proof has never been made, but on the contrary the testimony and documentary evidence presented by defendants prima facie shows that none of the plaintiffs is either an owner of land in the District nor an owner of a certificate of beneficial interest.

The complaint was verified by plaintiff Weybrew, but neither he nor any other plaintiff testified in any of the proceedings; the petition for a receiver was also verified by Weybrew, and in material substance alleges that the Trust was to continue for a period of 5 years, at which time the trustees were required to distribute the assets by conveying the system of irrigation works together with all properties to the beneficiaries, but have not dissolved the Trust nor distributed the assets or any part thereof, but on the contrary have deliberately and unlawfully pretended to prolong the life of the Trust, and now threaten to further prolong the life thereof with intent and for the purpose of securing personal benefits to themselves, their friends, relatives and associates, including payment to themselves or some of them of large fees and salaries; but the property in the hands of defendants belongs to these plaintiffs, and the other owners of certificates of beneficial interest, and none of the defendants has any right, title or interest threin; that at no time has an audit of said books been made, and reports which the trustees are required to make periodically have not been made, but on the contrary such few reports issued were palpably misleading; that the trustees have illegally diverted large sums, and those defendants who purport to act as trustees threaten to and will illegally divert and misappropriate further assets of the Trust unless the relief prayed for is granted by this court; that some of the defendants have paid themselves and to their friends and associates large sums of money as purported salaries or fees, thereby diminishing the trust estate, and some threaten to continue to make such payments; that the defendants purporting to act as trustees will, unless relief is granted by the court, misappropriate and dissipate said assets to the great injury of plaintiffs and the other owners of certifi-

cates of beneficial interest; that said Trust is insolvent and unless its affairs are immediately administered the creditors of the Trust and holders of certificates of beneficial interest will be greatly injured; and the prayer (1) for an order appointing some suitable person as receiver for the Trust, pending a final determination of this cause, with all powers usually given to such receivers to take charge of the property and assets of the Trust, to conserve and administer such assets and pay and discharge the lawful indebtedness thereof, subject to such orders of the court as may be necessary from time to time; (2) for an order directed to defendants commanding them to show cause before the court on a day certain why the relief herein prayed for should not be granted; and (3) for such other and further orders as may be appropriate and proper in the premises.

Within the five days granted, defendants filed their answer containing six defenses, which in substantial effect are: (1) the three extensions of the Term of the Trust; (2) appears from the record that plaintiffs are without legal capacity to sue; (3) the Declaration of Trust and terms of settlement submitted to and approved by the qualified electors, including plaintiffs, and including the terms and conditions under which certificates of beneficial interest are held; (4) plaintiffs are not the real parties in interest, and Fulenwider and Box Elder Farms Co. are the real parties conducting such action in plaintiffs' names; (5) defendant East Denver Municipal Irrigation District is indebted to defendant Trust in the amount of $155,642.21 and plaintiffs' counsel likewise direct the policy of said District in this action; and (6) specifically deny that District Landowners Trust is insolvent, but on the contrary is possessed of lands, water rights, personal property and assets of the minimum value of $300,000 over and above its current liabilities, and itemized said

items in form showing total assets over liabilities of $369,787.27.

The hearing began on July 25, 1939, without plaintiffs to prove *their competency to begin and prosecute such action, the burden of proof under the court's orders still resting on defendants to show cause why a receiver should not be appointed;* the plaintiffs seemingly relied mostly on the assumption that District Landowners Trust was created for a period of five years only, and somewhat on the testimony of the court's auditor, and to some extent on the general and financial statements made by the Trust and on certain letters and accounts introduced as exhibits; and defendants relied on plaintiffs' inabliity to prove themselves qualified to bring and maintain such action and on the legality of the three formal extensions of the term of the Trust, each executed and filed of record and recorded in said several counties prior to the expiration period of the preceding term and also upon the general rule applying to trusts, and upon the Declaration of Trust and its provisions, and upon the general and financial statements of the Trust issued from time to time being true and correct in all particulars, and upon the records of the board of trustees' meetings and all transactions of every nature being legal and within the powers of said board—all of which were introduced as exhibits and admitted in evidence; and, in addition presented the testimony of the accountant, Holben, on cross-examination, and that of Mrs. Carter and that of Melville substantiating the above financial condition of the Trust on that day, and that it had no pressing current indebtedness of any kind which it could not meet, and substantially sustained each of its pleaded defenses, and no testimony or evidence of any nature was presented in rebuttal.

Plaintiffs in the afternoon of July 28 rested, and

defendants moved for a dismissal of the petition on the record as made, since plaintiffs had made no effort to prove their competency to institute and maintain such action and no proof to sustain the allegations of the petition or of the complaint; and the court promptly denied the motion, exception was saved, and the court announced its findings generally in favor of plaintiffs and that a receiver would be appointed on the following day, Saturday, July 29, at 11 o'clock in the forenoon, as several persons had been recommended to him; counsel for defendants asked if the court would grant a stay of the order appointing the receiver, as counsel desired to petition the Supreme Court to review the order appointing a receiver to manage the properties and assets of the Trust, and the court denied the request.

Defendants immediately prepared and presented to the Chief Justice of the Colorado supreme court at 9 o'clock on the following morning an Application for Stay of Execution under Rule 22 (1 C. S. A. Rules of Supreme Court, page 627), to which were attached the record of the court below, beginning with the filing of the complaint on February 16, 1939, and ending on July 28, 1939, in accordance with Rule 18 (1 C. S. A. Rules of Supreme Court, page 624) allowing review on error.

The court being in vacation, but a majority subject to call, the Chief Justice instructed the clerk of the supreme court to telephone the district judge to stay further proceedings until Monday morning, July 31, as the matter then would be heard by the supreme court, and the clerk so did; but, notwithstanding such fact, the trial court at 11 o'clock on said Saturday, entered a decree in material substance that the court had jurisdiction, all the allegations of the petition were sustained and true, all the property and assets of the

Trust belong to plaintiffs and other holders of certificates of beneficial interest, the facts justified the appointment of a receiver; Teller Ammons, a resident of the City and County of Denver, was appointed receiver for all the property and assets of the Trust, and for all the rents and profits thereof, to handle the same under the direction of the court, a stay of execution granted for 5 days provided all books and records of the Trust are deposited with the clerk of this court, until the further order of the court none of the defendants act as trustees nor incur any additional indebtedness or obligations, nor expend any funds now in the hands of the Trust or which may be collected without an order of the court, and said trustees shall not contract for new or additional works or improvements nor institute any additional litigation in any manner affecting the Trust estate.

Counsel for defendants then filed a motion for rehearing on August 3, 1939, consisting of 27 alleged errors committed by the trial court, which was promptly overruled; and afterwards on August 10, 1939, I. B. Melville, as one of the attorneys for defendants, filed a petition reciting in substantial substance that the decree of the court prohibited the Trust from expending any funds without an order of the court, that this cause had been docketed in the supreme court and a bill of exceptions and transcript had been ordered; that on July 21, the Trust had employed Harold G. King to prepare the answer to the petition for a receiver and to try the case in this court and prosecute a writ of error to the supreme court to review any order entered herein, and had agreed to pay him a sum not exceeding $1,000, and had paid him $200 on account, and he now required an additional $500 for supreme court work—prayed that an order be entered permitting the Trust to pay the court reporter for

bill of exceptions, the clerk for the transcript of record, and attorney King $500 for his services to be rendered.

Thereafter on August 10, 1939, the court formally denied the motion for a rehearing; and on the same day denied the petition for the bill of exceptions, the transcript of record, and attorney's fee—but later allowed defendant Trust to pay the reporter for bill of exceptions and ordered the clerk to furnish the transcript of record, the pay therefor to be determined later; and thereafter and on September 22, 1939, defendants filed in the supreme court their application for a supersedeas, praying that the writ of error be endorsed to operate as a supersedeas, and that the cause be finally determined upon such application.

On February 14, 1940, argument of counsel was heard by the supreme court; and afterwards on April 8, 1940, the supreme court filed its written Opinion affirming the judgment of the trial court; and afterwards on May 4, 1940, within the time granted by the supreme court, plaintiffs in error filed their petition for a rehearing in said supreme court, reciting at length the alleged errors committed, and supported the same by extensive excerpts from the record with citations of authorities; and thereafter and on June 3, 1940, the petition for a rehearing was denied by the supreme court; and thereafter and on June 10, 1940, plaintiffs in error filed their praecipe with the Clerk of said Supreme Court for a transcript of the record to be used in making application to the Supreme Court of the United States for a writ of certiorari, and therein asked for ten authenticated and certified copies of the printed record in said cause containing the essential parts of the record on error in said supreme court, including the application for a writ of error to operate as a supersedeas and the documents attached thereto, and all subsequent proceedings in the supreme

court, including the application to the Chief Justice of the supreme court for an extension of 30 days, and his order made on August 30, 1940, granting an additional 30 days from September 3, 1940, and the praecipe of defendants in error asking the last above be included in the printed record, including this summary statement and the assignments of error in this court, both of which have been filed in the office of the clerk of the supreme court of Colorado.

All of the pleadings, petitions, motions, demurrers, rulings and orders of the trial court, and all matters in the supreme court of the State of Colorado, including its written opinion, the judgment and its order denying the petition for rehearing are included in the printed record and each indexed to the page where found.

Petitioners affirm that the errors committed by the trial court, as assigned for error in the supreme court of Colorado, and the errors committed by said supreme court in affirming the rulings, orders and decree entered by the trial court, as contained in the petition for rehearing in said supreme court, and the denial of such petition for rehearing, are each contrary to that portion of article 5 of the amendments to the Constitution of the United States, in that your petitioners have been deprived of their property without due process of law; and are contrary to section 1 of article 14 of said amendments, in that their written contract with respondents has been set aside, they have been deprived of their property without due process of law, and they have not been given the equal protection of the laws—and for the above reasons your petitioners are entitled to relief in this court.

Respectfully submitted,

I. B. MELVILLE,
Attorney pro se and Attorney for other petitioners.

PETITIONERS' ASSIGNMENTS OF ERROR

Come now your petitioners and make known to this Honorable Court that the supreme court of the state of Colorado committed grievous errors in affirming the orders and decree of the trial court, and like errors in denying the petition for a rehearing of plaintiffs in error therein, your petitioners here, in the following particulars:

First. In erroneously assuming, and so holding, that plaintiffs below had legal capacity to institute or to maintain said action.

Second. In erroneously holding that the trial court had jurisdiction of the cause below.

Third. In holding with the lower court that the burden of proof was on defendants below to show cause why the books and records of defendant District Landowners Trust should not be impounded in the registry of the trial court, and an accounting thereof made at the expense of the Trust.

Fourth. In holding that there was any evidence sufficient to warrant the trial court in impounding said books and records and having the same audited, or in having the expense taxed to defendant Trust below.

Fifth. In holding that the burden of proof was on defendants below to show cause why a receiver should not be appointed to take charge of all the property and assets of the Trust and collect all rents and income and pay all debts.

Sixth. That the court erred, both in upholding the trial court and in denying the petition for a rehearing, in holding that plaintiffs could include in their complaint both an action against the Trust and the trustees, and also against present and past trustees in their individual capacity.

Seventh. In holding that there was any evidence sufficient to warrant the appointment of a receiver.

Eighth. In holding that the Term of the Trust had expired, and that all the property constituting the Trust Fund is the property of plaintiffs and other holders of certificates of beneficial interest.

Ninth. That the court erred, both in upholding the trial court and in denying the petition for a rehearing, in removing the trustees and replacing them with a receiver.

Tenth. That the court erred, both in upholding the trial court and in denying the petition for a rehearing, in enjoining defendants from using any funds for the employment of Harold G. King, in view of the admitted fact that associate counsel Melville was in such ill health as to be unable to prepare and prosecute a writ of error to the supreme court of Colorado.

Eleventh. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it deprived defendants and particularly defendant District Landowners Trust of their property without due process of law contrary to the provisions of article 5 of the amendments to the constitution of the United States, and also contrary to the provisions of section 25 of article 2 of the constitution of the State of Colorado.

Twelfth. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it impaired and set aside the written contract between defendant District Landowners Trust and plaintiffs contrary to section 1 of article 14 of the amendments to the constitution of the United States, and contrary to section 3 of article 2 of the constitution of the State of Colorado.

Thirteenth. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it deprived defendants and particularly defendant Trust of their property without due process of law contrary to section 1, of article 14 of the amendments to the constitution of the United States, and also contrary to the provisions of section 25 of article 2 of the constitution of the State of Colorado.

Fourteenth. That the court erred, both in upholding the judgment of the trial court and in denying the petition for a rehearing, in that it deprived defendants and particularly defendant District Landowners Trust of the equal protection of the law contrary to section 1 of article 14 of the amendments to the constitution of the United States, and also contrary of the supreme court decisions and laws of the State of Colorado.

Respectfully submitted.

I. B. MELVILLE,
Attorney pro se and Attorney for other Petitioners for a Writ of Certiorari.

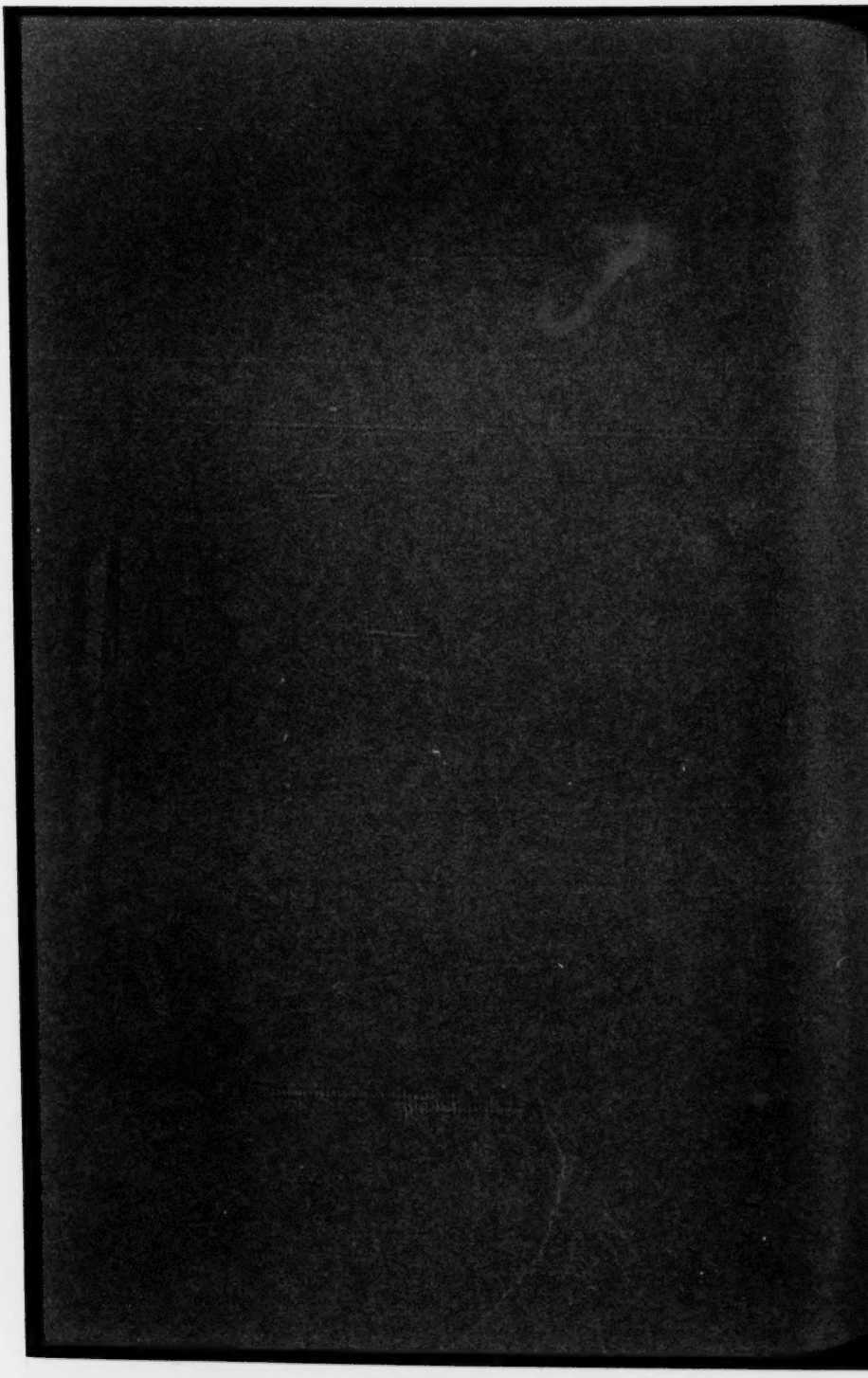
SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480



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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, PETITIONERS,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The judgment herein sought to be reviewed is a final judgment.

The second paragraph of Rule 18 of the supreme court of Colorado (1 C. S. A. Supreme Court Rules, page 624) reads:

> "An order appointing, or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver, may be reviewed on error, before final judgment if prompt application for that purpose be made."

In any event, plaintiffs below have made it a final judgment in taking over all of the property and assets and the complete management of District Landowners Trust.

U. S. C. A. Vol. 28, § 344, sub. b, reads:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed upon by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States;

and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Plaintiffs Without Legal Capacity to Bring Action.

The Record shows that plaintiffs were neither owners of land in the District or owners or holders of certificates of beneficial interest, and it requires no citation of authorities to show that they have not the legal capacity to institute or to maintain this action.

The Trial Court Had No Jurisdiction.

It is self evident that the trial court had no jurisdiction of the cause without a plaintiff or plaintiffs legally qualified to institute the action.

To Show Cause Why an Accounting of Trust Assets and Property Should Not Be Made.

1 Corpus Juris Secundum, page 662, § 30, reads:

"A suit for an accounting may be brought by any person who has an interest in the property or funds to be accounted for, and conversely, one who has no such interest cannot maintain the action."

Burden of Proof Placed on Defendants to Show Cause Why a Receiver Should Not Be Appointed Over Trust Assets.

"The burden is on applicant to show a proper cause for the appointment of a receiver and the necessity therefor. Except where it is required by the mandate of an appellate court, an appointment is erroneous when made in a suit wherein no evidence is introduced and the petition is not verified; before the appointment may properly be made, applicant must offer satisfactory proof in some form, and the showing made must be sufficient."

53 Corpus Juris, page 65, Part § 64.

The Colorado Code of Civil Procedure (1 C. S. A., page 272, § 180), reads:

"A receiver may be appointed by the court in which an action is pending, or by a judge thereof, or, pending proceedings in the supreme court upon appeal or writ of error, by the court from whose final judgment such appellant proceedings are prosecuted, or by the judge of such court:

"First—Before judgment, provisionally, on application, when he establishes a prima facie right to the property, or to an interest in the property, which is the subject of the action, and which is in possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired."

In Holding That There Was Any Evidence Sufficient to Warrant Impounding the Books.

No evidence will be found in the entire Record to warrant the impounding or the accounting of the books and records of the Trust.

In Holding That Plaintiffs Could Include in Their Complaint the Trust and the Trustees and Also Against Present and Past Trustees in Their Individual Capacity.

The Code of Civil Procedure of Colorado (1 C. S. A., pages 158-159), reads:

> "The plaintiff may unite several causes of action in the same complaint, when they all arise out of any one of the following classes; provided, they affect all of the same parties, both plaintiff and defendant, and affect them in the same character and capacity; * * *"

See following Colorado cases upholding this provision of the Code:

Merrill v. Suffa, 42 Colo. 195, 201, 93 P. 1099, 1104.

Dubois v. Bowles, 30 Colo. 44, 51, 69 P. 1067, 1072.

Faust v. Smith, 3 Colo. App. 505, 506, 34 P. 261, 262.

In Holding That There Was Any Evidence Sufficient to Warrant the Appointment of a Receiver.

No evidence can be found in the entire Record to warrant such appointment.

In Holding That the Term of The Trust Had Expired.

The original term of the Trust was legally extended as shown by the Record, at pages 92-96, and this question was determined by the supreme court of Colorado, in *District Landowners Trust v. Doherty*, 94 Colo. 385, 391, 30 P. (2d) 319, reading:

> "An unexecuted trust will not terminate because of a delay on the part of the trustee in executing it, notwithstanding the trust instrument directs its execution within a certain time" (citing 65 C. J., p. 352, § 125). "Considering the requirements in relation to things to be done by the trustees, as set forth in the declaration and certificate, and the lack of definite statement with reference to when the trust must be executed, and the uncompleted state thereof, it harmonizes with reason to say it should at least continue until so administered that the certificate of indebtedness sued on, and the like one referred to therein, are discharged in accordance with their terms."

Removing the Trustees and Replacing Them With a Receiver.

In 65 Corpus Juris 353, Sec. 128, in treating this subject, says:

> "By decree of court—(1) In General. Courts of equity in the exercise of their supervisory power may, in a proper case, before the expiration of the term for which an express trust is created, change it; but exceptional circumstances must exist. It is only when all the parties in interest are before the court, when each is sui

juris, and all join in the application that a court of equity ever terminates a trust. Even when all these circumstances exist, equity does not do so by force of the application, but only when a decree is proper. When such circumstances exist power is in the court of equity, but with the power is not necessarily imposed the duty to exercise it. It is still discretionary, but the court may not arbitrarily deny the termination of a trust. The court will be careful not to defeat any object of the creator apparent from his declaration of the purposes of the trust. Where the trustee is given discretionary power to terminate the trust at an appointed time, or upon certain contingencies, the court may terminate the trust where the trustee unjustifiably refuses to convey the property to the beneficiary. The court may terminate a trust where it is for the best interest of the sole beneficiary as settlor.

Enjoining Defendants From Using Any Trust Funds for Attorney's Fee.

It is quite apparent from the Record herein that the trial court, and the supreme court by denying the petition for a receiver, fully intended to deprive the Trust and Melville of any funds to have the cause reviewed by this Court

In *People ex rel v. District Court*, 33 Colo. 293, 80 p. 908, a case very similar to the instant case, a writ of prohibition issued against the lower court, and, at page 297, the court said:

> "In brief, the allegations of the complaint charge mismanagement, fraud, and ultra vires acts against the officers of the corporation, already committed, and plaintiffs fear that similar

acts will be perpetrated. Some of these charges, made against Daniels and Merrill, are, if true, wrongs against the plaintiff, as a stockholder, and some wrongs against him in his individual capacity. The prayer for relief is for damages against the defendants in the sum of seventeen thousand dollars, for a decree setting aside the charter and corporate powers of the different corporations, dissolving them and closing up their business, for an injunction pending the litigation restraining the defendants from further wrongful acts in their management, and from disposing of their corporate property or assets, and for the appointment of a receiver. The demurrer and motion were heard at the same time, and the court overruled them, and, as appears from its opinion in passing upon the same, without giving the defendants an opportunity to answer, immediately, and indeed, before the formal order overruling the motion and demurrer was announced appointed a receiver of the property, naming him, and on the same day approved his bond, and ordered the corporate officers at once to turn over all their properties and effects, books, deeds, etc.; in effect substituting its own receiver for the officers of all these corporations. * * * It is a rule in this state, as generally in the country, that in the absence of a permissive statute, courts of equity have no power to dissolve a going business corporation, and to that end appoint a receiver for the sequestration of the corporate property."

That in view of the eleventh, twelfth, thirteenth and fourteenth assignments of error being in contravention of article five and of section one of article

14 of the amendments to the Constitution of the United States, it becomes the duty of this Honorable Court to so determine.

Missouri, K. & T. Ry. Co. v. Love, 174 Fed. 493, 502-503, reading:

> "Presumably the commissioners preserved a due relation among them so far as practicable in such cases, and there is no contention that rates left untouched are relatively as low. When all the local freight earnings are considered, an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause.
>
> "Upon the proofs temporary injunctions should be granted. Provisions made in the orders for the keeping of accounts and the giving of bonds safeguarding, so far as practicable, the patrons of the roads if it should ultimately be determined the enforcement of the rates should not have been suspended."

In *Love v. Atchison, T. & S. F. Ry. Co.,* 185 Fed. 321, the foregoing case was reviewed by the Eighth Circuit Court of Appeals, and the court beginning at page 331, said:

> "But the granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and where, as in the case in hand, that court has not departed from the equitable principles established for its guidance, its orders may not be reversed by the appellate court, without clear proof that it has abused discretion. (Citing numerous cases.)
>
> "An appeal from an order granting or refusing an interlocutory injunction does not in-

voke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion? Massie v. Buck, 128 Fed. 27, 31, 62 C. C. A. 535.

"The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremedial injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irreparable if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by a bond, the injunction usually should be granted." (Citing cases).

"But counsel argue (1) that this rule applies only to cases in which the purpose and effect of the injunctions are to maintain the status quo, and these injunctions were issued to change it; (2) that the companies acquiesced in the fare and the rates, and thereby, and by the fact that new industries have grown up in reliance upon

them, they are estopped from enjoining them; and (3) that there were no emergency requiring the issue of the injunctions. These arguments are material only on the assumption that the fare and the rates were confiiscatory; for if they were reasonable and just, all concede that no injunctions should have issued. If they were confiscatory, and injunctions had issued against the enforcement of the constitutional provision and the orders which prescribed them before they went into effect, upon such opinion evidence as could then have been produced, they would have fallen under and would have been sustained by the established rule, which has been cited. A fortiori, should they be sustained now, when their issue is based on the more certain and convincing evidence of the necessary effect of the actual operation of this fare and these rates during a trial of about two years?

"Again, the operation of the fare and rates was a continuing unconstitutional taking of the property of the companies from the time they were put into effect until their enforcement was enjoined. The companies' obedience to the provision of the Oklahoma Constitution and to the orders that installed the rates was under protest, under the penalty of drastic fines for a failure to obey, and was fully justified by their situation and the wisdom of an actual test and operation of the fare and the rates, in order certainly to determine and clearly to prove their effect. And even asquiescence in past continuing injuries does not estop their victim from enjoining their future continuance. One may not escape an injunction against his cutting the remainder of the trees on his neighbor's lands, be-

cause the latter acquiesced in his cutting a part of them, nor an injunction against his future infringement of his neighbor's patent, because he has long infringed it with impunity, nor an injunction against his continuing trespass upon his neighbor's land, because he has long trespassed without rebuke." (Citing cases.)

"Moreover, in truth, the purpose and effect of these injunctions were to restore and maintain the status which existed before the unconstitutional acts of the people and the officers of Oklahoma disturbed that status, and thereby to prevent the irreparable injury which the companies must otherwise have suffered during the pendency of these suits. Plenary power is conferred, and the undoubted duty is imposed, upon a court of equity to issue its injunction for such a purpose" (Citing cases). "The protests of the companies against the fare and the rates and the fourteenth amendment to the Constitution constitute ample notice to the officers of the state and to the owners of the new industries that sprung up along the railroads that they could not acquire any right to continuous confiscatory fares and rates by the acquiescence of the companies in a test of their actual operation. The companies were not estopped thereby from obtaining the injunctions (Southern Pac. Co. v. Interstate Commerce Com., 219 U. S. 438, 449-452, 55 L. Ed. 283, 289-290), and no greater emergency than the daily and continual taking of some part of their properties without just compensation during the long time that experience has demonstrated to be necessary to press one of these rates cases to final decree was required to justify the issue of the injunctions.

"The single question remains: Does the evidence clearly show that the court below was guilty of an abuse of its discretion in its finding that the necessary effect of this fare and these rates was to deprive the companies of a fair return upon the values of their respective properties in Oklahoma? This question must be answered in the negative. No good purpose would be served by an attempt to recite or review the voluminous testimony upon the various issues which lead up to this conclusion. Suffice it to say that this court is unanimous in its opinion that the record in this case, not only fails to prove any abuse of discretion by the court below in the isuance of these injunctions, but sustains its findings that the fare and rates in question are confiscatory and its orders for the issue of the injunctions.

"Those orders must be affirmed; and it is so ordered."

See also:

Thompson v. Hays (Eighth Circuit Court of Appeals), 11 Fed. (2d) 244, 247-250.

Truax v. Corrigan, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

Adams v. Sanger, 303 U. S. 59, 60, 82 L. Ed. 649, 650.

Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 372-374, 58 L. Ed. 1001, 1004-1005.

Krause Brothers Lumber Co. v. Mellon, 276 U. S. 386, 391-394, 72 L. Ed. 620, 622-624.

On certiorari the Supreme Court will examine the Record, and reverse for legal insufficiency.—Simpkins Federal Practice (3d ed.), Sec. 964, page 684, citing:

C. M. & St. Paul R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043.

Respectfully submitted,

I. B. MELVILLE,
Attorney pro se and for other Petitioners.

FILED
NOV 7 1940
CHARLES ELMORE CROP
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, Petitioners,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELLA BETH B. BOSTWICK, STEPHEN J. CURTIS, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO SUPPLEMENT RECORD, SUPPLEMENTAL RECORD, ASSIGNMENTS OF ERROR, BRIEF IN SUPPORT THEREOF

IRVING E. MELVILLE,
Security Building, Denver, Colorado,
Attorney pro se and for other Petitioners.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1940

No. 480

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN and C. D. CUTLER, as Trustees of District Landowners Trust, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER and HUBERT L. SHATTUCK, PETITIONERS,

vs.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, ELLA BOSTWICK, GLEN BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a corporation, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO SUPPLEMENT RECORD

Come now the petitioners above named and respectfully request this Honorable Court, in the above entitled and numbered cause, to issue a Writ of Certiorari to division 4 and to the judge thereof of the district court of the city and county of

Denver in the state of Colorado in Cause No. A-23959 for the material part of the record subsequent to the original Record now before this Court in Cause No. 14634 of the supreme court of the state of Colorado—and, as grounds therefor, petitioners District Landowners Trust and said Trustees show and make known to this Court that the written contract between said Trust and plaintiffs below, respondents here, has been wrongfully canceled and set aside by said district court, and that said named petitioners have each been deprived of their property and property rights by said court without due process of law, and each has been denied the equal protection of the law by said court; and that the above named petitioners, appearing in their individual capacities, have each been deprived of his personal and property rights without due process of law, and each has been denied the equal protection of the law, by said court —all of said acts of said district court have been done in direct contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in direct violation of Section 25 of Article II of the constitution of the state of Colorado.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colorado,
Attorney *pro se, and* Attorney for
the other named Petitioners

SUMMARY STATEMENT.

Your petitioners assert that, as appears from the certified copies of the proceedings of division 4 of the district court of the city and county of Denver in the state of Colorado in cause numbered A-23959

made subsequent to the proceedings included in the original Record on Writ of Certiorari in Cause No. 480, while the petition for a rehearing filed by defendants in error therein was pending and undetermined, defendants filed in said district court three special demurrers to the complaint in said Cause (the remittitur having been issued to the trial court on April 8, 1940), but were unable to obtain a hearing thereon until June 7, 1940, and on said latter date said district court promptly overruled each of said demurrers, to which rulings exceptions were saved, and gave defendants ten days within which to either answer or elect to stand on said demurrers, and within the time granted defendants appeared by their attorney and announced their election to stand on said respective demurrers and requested that judgment thereon should be promptly entered, but said court refused to enter judgment on any thereof on the announced ground that the respective amounts of said judgments could not be determined at that time; and that, at a subsequent hearing, when none of defendants or their attorney was present, said district court set aside defendants' election to stand on said demurrers and extended the time another period of ten days within which to elect, and prior to said latter date defendants served notice on opposing counsel that on such date they would appear and again elect and ask that judgment be entered against each of them at said time, to-wit, on August 7, 1940; that on said August 7, 1940, these defendants were informed by opposing counsel and the division clerk of said court that judge Hicks was on a vacation but had arranged for another district division judge to hear all routine matters in the former's absence, and all the files in said cause were reported by said division clerk to be locked up in the

desk of Judge Hicks for which the clerk had no key, but, as the notice served contained the former order, defendants' election to stand on their respective demurrers was entered by district Judge Johnson, who, without any data from said court files, could not enter final judgment; and your petitioners assert that said district court still refuses to enter any final judgment and, in their opinion, no final judgment will be entered until said farm properties and buildings and fences are so run down and deteriorated that no further income will be available from this source.

That your petitioners further assert that said receiver still retains in his hands all of the property and assets and books and records and secured promissory notes and accounts belonging to District Landowners Trust, and continues to rent said improved farms to tenant farmers and collect the proceeds of all crops, but has made no effort to collect from said The East Denver Municipal Irrigation District an indebtedness upwards of $200,000, nor to collect from owners of irrigation district lands either the principal or interest of their secured promissory notes belonging to the Trust, nor has he paid the taxes on any of said lands although long past due, nor has he kept the buildings or fences in repair, nor paid any current bills or indebtedness matured, but has used and is continuing to use Trust funds for paying his own salary and expenses and the salary and expenses of an attorney employed by him as attorney for the receiver.

Your petitioners are credibly informed and believe that respondents herein will make no answer to the original Writ of Certiorari herein, but are relying on the premise that neither said district court nor said supreme court was specifically advised by the pleadings or otherwise that defendants were

in any way relying upon any portion of the Federal Constitution in the trial of this Cause.

Your petitioners assert that they were unable and continue to be unable to present to the supreme court of Colorado or to file therein the supplemental record hereto appended on account of the rules of practice in the supreme and district courts of the state of Colorado holding that the overruling or sustaining a demurrer cannot be reviewed until final judgment is entered in said cause.

This rule is unreasonable and unjust in the circumstances of this Case, and should not be sustained by this court or allowed to interfere with the granting of this Writ of Certiorari.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colorado,
Attorney *pro se* and Attorney for
the other named Petitioners.

DISTRICT COURT
CITY AND COUNTY OF DENVER
SECOND JUDICIAL DISTRICT

STATE OF COLORADO, }
City and County of Denver } ss.

Pleas in the District Court of the City and County of Denver, State of Colorado, in the Fourth Division thereof, before the Hon. Henry A. Hicks, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said county, on the second Tuesday (it being the 9th day) of April, A. D. One Thousand Nine Hundred Forty.

Present:

HONORABLE HENRY A. HICKS,
one of the judges of the District Court.

JOHN A. CARROLL,
Esq., District Atorney of said District.

W. E. GUTHNER,
Esq., Manager of Safety and Excise and Ex-officio Sheriff of said County

F. W. SANBORN,
Esq., Clerk of said Court.

Filed in District Court, City and County of Denver, Colo., May 16, 1940. F. W. Sanborn, Clerk.

STATE OF COLORADO, }
City and County of Denver } ss.

IN THE DISTRICT COURT

No. A23959 Div. IV.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN MCHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITIES COMPANY, a corporation,
Plaintiffs,

vs.

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN AND C. D. CUTLER, AS TRUSTEES, OF DISTRICT LANDOWNERS TRUST, THE EAST DENVER MUNICIPAL IRRIGATION DISTRICT, DISTRICT LANDOWNERS TRUST, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER, ED. SHAW AND HUBERT L. SHATTUCK,
Defendants.

DEMURRERS TO COMPLAINT

Comes now the individual defendants above named, I. B. Melville, H. G. Day, Charles C. Sackmann and C. D. Cutler, individually, by their attorney, and demur to the complaint herein, and, for grounds therefor, show and make known to this Court that, as appears from the face of the complaint and Exhibit A attached thereto and made a part thereof:

I.

Parties plaintiff herein are without legal capacity to institute or to maintain this action.

II.

This court is without jurisdiction of the subject of the action by reason of a defect of parties plaintiff.

III.

This court is without jurisdiction of this cause at this time, because this cause is now pending in the Supreme Court of this State, in which cause a supersedeas has been issued to this court and is still in full force and effect.

IV.

There is a misjoinder of parties defendant in that defendants, individually, are joined with defendants, as trustees, thereby seeking a judgment against each of them as individuals, and a judgment against each as a trustee, and also a judgment against defendant District Landowners Trust.

V.

There is a misjoinder of causes of action, in that there is a cause of action against these defendants, individually; a cause of action against these defendants as trustees; and a cause of action against defendant District Landowners Trust.

VI.

There is a defect of parties plaintiff in that neither the *cestui cue trustents* owning land in said The East Denver Municipal Irrigation District nor the creditors of defendant District Landowners Trust are parties hereto.

VII.

The complaint does not state facts sufficient to constitute a cause of action against these defendants.

VIII.

Overruling the above demurrers would be depriving these defendants of their property without due process of law and contrary to Art. II, § 25, of the Constitution of the State of Colorado, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HAROLD G. KING,
Attorney for the individual defendants above named.

Filed in District Court, City and County of Denver, Colo., May 16, 1940. F. W. Sanborn, Clerk.

STATE OF COLORADO, }
City and County of Denver } ss.

IN THE DISTRICT COURT

No. A23959 Div. IV.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN MCHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITIES COMPANY, a corporation,
Plaintiffs,

vs.

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN AND C. D. CUTLER, AS TRUSTEES, OF DISTRICT LANDOWNERS TRUST, THE EAST DENVER MUNICIPAL IRRIGATION DISTRICT, DISTRICT LANDOWNERS TRUST, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER, ED. SHAW AND HUBERT L. SHATTUCK,
Defendants.

DEMURRERS TO COMPLAINT

Comes now the defendants I. B. Melville, H. G. Day, A. C. Monson, Charles C. Sackmann and C. D. Cutler, as Trustees of District Landowners Trust, by their attorney, and demur to the complaint herein, and, for grounds therefor, show and make known to this Court that, as appears from the face of the complaint and Exhibit A attached thereto and made a part thereof:

I.

Parties plaintiff herein are without legal capacity to institute or maintain this action.

II.

This court is without jurisdiction of the subject of the action by reason of a defect of parties plaintiff.

III.

This court is without jurisdiction of this cause at this time, because this cause is now pending in the Supreme Court of this State, in which cause a supersedeas has been issued to this court and is still in full force and effect.

IV.

There is a misjoinder of parties defendant in that defendants, as trustees, are joined with defendants, individually, thereby seeking a judgment against each of them as trustees, and a judgment against each as an individual, and also a judgment against defendant District Landowners Trust.

V.

There is a misjoinder of causes of action, in that there is a cause of action against these defendants as trustees; a cause of action against these defendants, individually; and a cause of action against defendant District Landowners Trust.

VI.

There is a defect of parties plaintiff in that neither the *cestui que trustents* owning land in said The East Denver Municipal Irrigation District nor the creditors of defendant District Landowners Trust are parties hereto.

VII.

The complaint does not state facts sufficient to constitute a cause of action against these defendants.

VIII.

Overruling the above demurrers would be depriving these defendants of their property without due process of law and contrary to Art. II, § 25, of the Constitution of the State of Colorado, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HAROLD G. KING,
Attorney for the Trustees Above Named.

Filed in District Court, City and County of Denver, Colo., May 16, 1940. F. W. Sanborn, Clerk.

STATE OF COLORADO, } ss.
City and County of Denver }

IN THE DISTRICT COURT

No. A23959 Div. IV.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN MCHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITIES COMPANY, a corporation,
Plaintiffs,

vs.

I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN AND C. D. CUTLER, AS TRUSTEES, OF DISTRICT LANDOWNERS TRUST, THE EAST DENVER MUNICIPAL IRRIGATION DISTRICT, DISTRICT LANDOWNERS TRUST, I. B. MELVILLE, A. C. MONSON, H. G. DAY, CHARLES C. SACKMANN, C. D. CUTLER, ED. SHAW AND HUBERT L. SHATTUCK,
Defendants.

DEMURRERS TO COMPLAINT

Comes now the District Landowners Trust, one of the defendants above named, by its attorney, and demurs to the complaint herein, and, for grounds therefor, shows and makes known to this Court that, as appears from the face of the complaint and Exhibit A attached thereto and made a part thereof:

I.

Parties plaintiff herein are without legal capacity to institute or to maintain this action.

II.

This court is without jurisdiction of the subject of the action by reason of a defect of parties plaintiff.

III.

This court is without jurisdiction of this cause at this time, because this cause is now pending in the Supreme Court of this State, in which cause a supersedeas has been issued to this court and is still in full force and effect.

IV.

There is a misjoinder of parties defendant in that this defendant is joined with certain defendants, individually, and with certain defendants, as trustees, thereby seeking a judgment against each of them as individuals, and a judgment against each of them as a trustee, and also a judgment against this defend- District Landowners Trust.

V.

There is a misjoinder of causes of action, in that there is a cause of action against this defendant; against certain defendants, individually and a cause of action against certain defendants as trustees.

VI.

There is a defect of parties plaintiff in that neither the *cestui que trustents* of this defendant owning land in said The East Denver Municipal Irrigation District nor the creditors of this defendant are parties hereto.

VII.

The complaint does not state facts sufficient to constitute a cause of action against this defendant.

VIII.

Overruling the above demurrers would be depriving this defendant, its *cestui que trustents* and creditors, of its and their property without due process of law and contrary to Art. II, § 25, of the Constitution of the State of Colorado, and contrary to the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HAROLD G. KING,
Attorney for Defendant District
Landowners Trust.

Be It Remembered, That heretofore, and on to-wit, the 7th day of June, A. D. 1940, the same being one of the regular juridical days of the April A. D. 1940 Term of Court, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

—o—

ARTHUR WEYBREW, et al, vs. I. B. MELVILLE, et al. No. A 23959 ORDER OF COURT

At this day come the parties hereto by their attorneys, respectively.

And thereupon, this cause coming on to be heard upon the demurrers of the defendants, I. B. Melville, H. G. Day, Charles C. Sackmann and C. D. Cutler, individually, to the complaint, the same is argued by counsel, and the Court being now sufficiently advised in the premises, doth overrule said demurrers.

Whereupon, it is ordered by the Court that the said defendants, individually, may have time and

until ten (10) days to elect whether to stand on their demurrers or twenty (20) days to answer.

—o—

ARTHUR WEYBREW, et al, vs. I. B. MELVILLE, et al. No. A 23959 ORDER OF COURT

At this day come the parties hereto by their attorneys, respectively.

And thereupon, this cause coming on to be heard upon the demurrers to the complaint of the defendants, I. B. Melville, H. G. Day, A. C. Monson, Charles C. Sackmann and C. D. Cutler as Trustees, the same is argued by counsel, and the Court being now sufficiently advised in the premises, doth overrule said Trustee demurrers.

Whereupon, it is ordered by the Court that the said defendants as Trustees, may have time and until ten (10) days to elect whether to stand on their demurrer or twenty (20) days to answer.

—o—

ARTHUR WEYBREW, et al, vs. I. B. MELVILLE, et al. No. A 23959 ORDER OF COURT

At this day come the parties hereto by their attorneys, respectively.

And thereupon, this cause coming on to be heard upon the demurrers of the defendant, Landowners Trust, to the complaint, the same is argued by counsel, and the Court being now sufficiently advised in the premises, doth overrule said demurrers.

Whereupon, it is ordered by the Court that the

defendant Landowners Trust, may have time and until ten (10) days to elect whether to stand on its demurrers or twenty (20) days to answer.

——o——

And Afterwards, and on to-wit, the 17th day of June, A. D. 1940, the following further proceedings inter alia, were had and entered of record in said Court to-wit:

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the defendants, I. B. Melville, H. G. Day, Charles C. Sackmann, and C. D. Cutler, individually, and elect to stand on their demurrer to the complaint.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the defendants, I. B. Melville, H. G. Day, Charles C. Sackmann, and C. D. Cutler, as Trustees, and elect to stand on their demurrer to the complaint.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day comes the defendant, the District Landowners Trust, by its attorney, and elects to stand on its demurrer to the complaint.

——o——

And Afterwards, and on to-wit, the 18th day of June, A. D. 1940, the following further proceedings, inter alia, were had and entered of record in said Court, to-wit:

—o—

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day this cause coming on for hearing upon the defendant's oral application for entry of final judgment herein, except A. C. Monson, individually and The East Denver Municipal Irrigation District, a quasi public corporation, and said defendants, except A. C. Monson, and The East Denver Municipal Irrigation District, a quasi public corporation, having heretofore elected to stand on their respective demurrers to the complaint, and the Court, after hearing the statements of counsel, and on its own motion, orders this cause continued for hearing until the 18th day of July, A. D. 1940, at 9:30 o'clock.

—o—

And Afterwards, and on to-wit, the 18th day of July, A. D. 1940, the following further proceedings, inter alia, were had and entered of record in said Court, to-wit:

—o—

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day comes the defendant, C. D. Cutler, individually and as Trustee of District Landowners' Trust, by his attorney, and thereupon, on his oral motion made in open Court.

It is ordered by the Court that the order heretofore entered herein on June 17, 1940, wherein it was ordered that all of the defendants herein stood upon the decision on the demurrers that they had heretofore filed herein, be, and the same is hereby set aside and held for naught as to the said defendant, C. D. Cutler, be permitted to file his answer herein forthwith, and that the plaintiffs may have ten days from this day to reply to the said answer, as they may be advised.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the plaintiffs herein, by their attorney, Lewis A. Dick, Esq., and the defendants Charles C. Sackmann and C. D. Cutler, by their attorney, Frank E. Hickey, Esq., and the defendants I. B. Melville and H. G. Day, not appearing.

And it appearing to the Court that this cause was on June 18, 1940, continued until this day for further hearing, on the Court's own motion,

(the 18th day of July, A. D. 1940)

It is ordered by the Court that the order of June 17, 1940, as to the defendants, I. B. Melville and H. G. Day, be modified wherein it was provided that the said defendants might have ten (10) days to elect, after the Court had overruled the said defendants' demurrer; and it appearing to the Court that no final disposition was made in said cause; and it further appearing to the Court that the said defendants, I. B. Melville and H. G. Day, were not entitled to make an election in the matter; and it

also appearing to the Court that the said defendants may have been misled by said order of election.

It is ordered by the Court that the said order of June 17, A. D. 1940, is hereby amended so that the said defendants be, and hereby are, allowed time until twenty (20) days from this date to file their answers herein.

——o——

And Afterwards, and on to-wit, the 7th day of August, A. D. 1940, the following further proceedings, inter alia, were had and entered of record in said Court, to-wit:

Judge Stanley H. Johnson sitting for Judge Henry A. Hicks.

——o——

ARTHUR WEYBREW, et al, No. A 23959
vs. ORDER OF COURT
I. B. MELVILLE, et al.

At this day come the defendants, I. B. Melville, H. G. Day and District Landowners Trust, and thereupon, on said defendants' motion, advising the Court that they stand on their demurrer which was heretofore overruled by the Court, on June 7, 1940, and that the same be made a matter of record herein, and that said motion be granted.

It is ordered by the Court that motion for final judgment be set for hearing in the Division to which the case belongs, when the Honorable Judge of said Division returns.

STATE OF COLORADO, }
City and County of Denver } ss.

SINGLE CERTIFICATE.

I, F. W. Sanborn, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Orders of Court and Demurrers had and entered of record in a certain cause in said Court lately depending wherein Arthur Weybrew, et al, Plaintiffs, and I. B. Melville, et al, Defendants, as the same now remains on file and of record in this office.

Witness, F. W. Sanborn, Clerk of said Court, with the seal thereof hereunto affixed at his office, in the City and County of Denver, State of Colorado, this 24th day of October, A. D. 1940.

SEAL

(Signed) F. W. SANBORN,
Clerk.

By J. G. McCONNELL,
Deputy Clerk.

PETITIONERS' ASSIGNMENTS OF ERROR.

Come now your petitioners and make known to this Honorable Court that division 4 of the district court of the city and county of Denver in the state of Colorado in Cause No. A-23959 and the judge thereof committed grievous errors in the orders and rulings made therein subsequent to the proceedings set forth in the original Record on Writ of Certiorari now pending in this court, in the following particulars:

First. In erroneously overruling the three special demurrers to the complaint in said Cause, each such ruling being in violation of petitioners' rights protected by section 25 of Article II of the constitution of the state of Colorado and by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Second. In refusing to dismiss the proceeding and order the books and records and accounts to be returned to defendants District Landowners Trust and to the Trustees named in said complaint—such refusal being in contravention of defendants' rights under section 25 of Article II of the constitution of the state of Colorado, and in contravention of their rights under section I of the Fourteenth Amendment to the Constitution of the United States.

Third. In refusing to discharge the receiver and to require him to return all the books and records and accounts and assets and property of the Trust in District Landowners Trust and to the Trustees named in said complaint—such refusal being in contravention of defendants' rights under the above stated provisions of the Colorado and United States Constitutions.

Fourth. In refusing to enter final judgment in said Cause after defendants had elected to stand on said demurrers, and in still refusing so to do and in taking no action to ascertain what amount said court intends to enter against each of these defendants.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colorado,
Attorney *pro se* and Attorney for
the other Petitioners above named.

BRIEF OF PETITIONERS IN SUPPORT OF WRIT.

Both the judge of the trial court and the judges of the supreme court took the oath of office required by the constitution of the State of Colorado, Article XII, Section 8, reading as follows:

> "Every civil officer, except members of the general assembly and such inferior officers as may be by law exempted, shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the constitution of the United States and of the state of Colorado, and to faithfully perform the duties of the office upon which he shall be about to enter."

It would not be proper for petitioners or for this Honorable Court to presume that either the trial court or the members of the supreme court decided the matters presented to each in this Cause in order to defeat the jurisdiction of this court, hence we must assume that each of said judges honestly believed that the facts and issues presented in the trial court did not come within the prohibition of Article II, Section 25, of the Colorado constitution, reading:

> "No person shall be deprived of life, liberty or property, without due process of law;"

nor within the prohibition of Section 1 of the Fourteenth Amendment to the Constitution of the United States, reading:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Nor will it be presumed that the trial judge or any judge of the state supreme court does not know that it requires legally competent parties to institute and maintain an action, and that without such competent parties, the trial court has no jurisdiction; nor presumed that the judge of any court of equity and law does not know the due process of law provisions of the state and federal constitutions, and does not know the meaning of judicial confiscation of property—since it is a matter of common knowledge that every such judge is familiar with the fundamental provisions of his state constitution and with the fundamental provisions of the Constitution of the United States—this is not a question involving the Federal constitutionality of a state statute or state public utility or commission, where necessarily the particular statute or the particular rules and regulations complained of as contrary to the Federal constitution must be called to the attention of the trial court and to the attention of the state supreme court but only a case in which all the proceedings of the trial court are in contravention of defendants' rights under both the state constitution and the constitution of the United States.

In *Furman v. Nichol,* 8 Wall. 44, 19 L. Ed. 370, the case involved the Bank of Tennessee which, inter alia, had guaranteed its issue of bank notes by making the latter legal payment at par for taxes, this clause being repealed in 1865, but the money tendered in August 1866 was issued prior to 1861; and, on Au-

gust 1, 1886, plaintiffs below, plaintiffs in error in the U. S. Sup. Ct., tendered their said bank notes to Nichol, the collector of taxes, in payment of taxes for the year ending August 26, 1866, and he refused to accept such money and asked for legal tender of United States; plaintiffs then filed their petition in the state circuit court of that county asking for a mandamus to compel the collector to accept said Tennessee Bank Notes, setting out the plain facts only without any reference to a Federal question being involved; and to this petition defendant filed a demurrer, which on argument was overruled, and the cause was taken by defendant collector on error to the state supreme court, which reversed the judgment, sustained the demurrer, and dismissed the petition—whereupon plaintiffs sued out this writ of error in the Supreme Court of the United States to review the judgment of the state supreme court. Defendant in error promptly challenged by motion the jurisdiction of the Supreme Court of the United States to review the state court judgment, and the case was fully argued both as to the question of jurisdiction and upon the merits. The Court, beginning at page 375 of the L. Ed., said:

> "It is enough for the purposes to say, that a cause can be removed from a state court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right, he claimed it gave him, was denied to him by the state court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the plead-

ings, but this is in no case necessary. If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the *court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand,* then *the jurisdiction of this court attaches.* And *it need not appear that the state court erred in its judgment.* It is *sufficient to confer jurisdiction that the question was in the case, was decided adversely to plaintiffs in error,* and that *the court was induced by it to make the judgment which it did.*" (Italics ours.)

Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits. (Continuing at page 376):

"The application for the writ proceeded on the theory that the state had, in the passage of the Act creating the Bank of Tennessee in 1838, made a contract with its people to receive these notes in payment of states taxes, and that it was not in the power of a subsequent Legislature to impair the binding force of this contract.

"The proceeding was an effort on the part of the plaintiffs in error to test the question of the validity of the authority of a public officer of the State, exercising authority under the State, on the ground that such authority was repugnant to that provision of the Federal Constitution which forbids a state to pass any law impairing the obligation of a contract. The purpose of the petition, the issue which it presented and sought to have determined, were as plainly to be seen, as if the words of the particular

provision relied on had been inserted in it, and the obnoxious legislation spread out at length. *All courts take notice, without pleading, of the Constitution of the United States, and the public laws of the State where they are exercising their functions.* (Italics ours.)

"It is insisted that the petition should have averred that the State had impaired, or by some act attempted to impair, the obligation of a contract, but this does sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes and entitled to have them received for taxes, by virtue of a contract with the State; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the Legislature to impair the validity of this contract.

"The *mandamus* was asked for to enforce a contract—to act directly on Nichol, the clerk and collector, who was exercising an authority under the State. What is plainer than that this proceeding impeached this authority, in its application to this case, because the legislation construed by this officer as depriving Furman of his right to pay his state taxes in notes of the Bank of Tennessee. If so, then the petitioners, insisting on the protection of the Constitution, drew in question both the validity of the state legislation and the authority of the state officer, and unless the record discloses that the supreme court of Tennessee denied relief, on other than Federal grounds, it is perfectly manifest that we are compelled to take jurisdiction of this cause. * * * * *

"What possible difference can it make, in deciding the question of jurisdiction, on which

of these three grounds (of the demurrer) the supreme court of Tennessee based their judgment. The right and duty of this Court to hear and determine this case does not depend on our ability to prove that the supreme court of Tennessee was wrong in its judgment. Whether that judgment was right or wrong, it is reviewable here, if it necessarily drew in question the validity of a state statute, or of an authority exercised under it, on the ground of the repugnancy of the statute to the Constitution of the United States. That it did do this there would seem to be no doubt.

"The defense really amounts to this, either that the alleged contract did not exist, or if it did, that there has been no legislation that impairs it.

"Whether it be true or false, depends upon the construction to be given to the laws of the State, which are claimed as proving the making of the contract and its violation.

"If so, this court decides for itself, whether the construction which the court below gave to these different statutes was correct or incorrect; and we are required to reverse, under the 25th section of the Judiciary Act, if we find that under an error of construction, that court has adjudged that no contract has been impaired. To do otherwise, would be to surrender to the state courts an important trust confided to this court by the Constitution."

In the leading case of *Crowell v. Randall,* 10 Peters 368, 9 L. ed. 458, a motion was made to dismiss the suit for want of jurisdiction upon the ground that there was nothing apparent on the rec-

ord to bring the case within the revising power of the Supreme Court of the United States under the twenty-fifth section of the Judiciary Act of 1789, and Mr. Justice Story in delivering the opinion of the court, beginning at page 382 of Peters and 467 of the L. ed., inter alia, said:

> "In the interpretation of this section of the Act of 1789, it has been uniformly held that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and, second, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist and were made. The principal, perhaps the only important difficulty which has ever been felt by the court, has been in ascertaining in particular cases whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been that it is not indispensable that it should appear on the record, *in totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient if it is clear from the facts stated by just and necessary inference, that the question was made, and the court below must, in order to have arrived at the judgment pronounced by it, have come to the very de-

cision of that question as indispensable to that judgment."

And, after reviewing all the cases in point up to that time, continues at pages 398 and 470, respectively:

"These are all the cases, it is believed, in which the construction of the twenty-fifth section of the Judiciary Act has been made matter of controversy; and they extend over a period of more than twenty-five years. They exhibit an uniformity of interpretation of that section which has never been broken in upon. They establish, so far as a course of decisions can establish, the propositions already stated in the early part of this opinion. The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is, that to bring a case within the twenty-fifth section of the Judiciary Act, it must appear on the fact of the record. *1st.* That some one of the questions stated in that section did arise in the state court. *2d.* That the question was decided by the state court, as required in the same section. *3d.* That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct anl positive terms, *ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment. *4th.* That it is not sufficient to show that a question might have arisen or been applicable to the

case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case."

In *Bridge Proprietors v. Hoboken L. and I. Co.*, 1 Wall. 68 U. S. (116, 17) L. ed. 571, under a similar state of facts as in the *Crowell Case* which is cited and approved as a leading case reported at page 575, L. ed., said:

> "It would be a new rule of pleading and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and the defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'"

In *Great Northern R. Co. v. Washington*, 300 U. S. 154, 165, 81 L. ed. 573, 581, this Court said:

> "We come now to the question whether, when the asserted right has been denied, this court is concluded by a finding of fact or a mixed finding of law and fact made by the state court. We have repeatedly held that in such case we must examine the evidence to ascertain whether it supports the decision against the claim of federal right."

In *Magwire v. Tyler*, 8 Wall. (75 U. S.) 650, 660, 29 L. ed. 320, 324, a similar condition to the above existed, and defendants in error objected to the jurisdiction of this Court to review on the ground that the state supreme court had determined the question on non-federal grounds, and at the latter pages this Court said:

> "Certain it is that federal questions are directly involved in the pleadings, and if it appears that none of the other defenses afford any legal answer to the suit, the conclusion must be *not presume that the court below decided the not presume that the court below decided the other issues erroneously in order to defeat their own jurisdiction.*"

In *Norris v. Alabama*, 294 U. S. 587, 590, 79 L. ed. 1074, 1077, the state supreme court affirmed the judgment of the lower court that no discrimination had been shown against colored jurors who came within the qualifications of a juror, and at the last mentioned pages of the Reports, this Court said:

> "The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specifically set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of

a state court as to a federal right and findings of facts are so intermingled that the latter control the former, it is incumbent upon us to analyse the facts in order that the appropriate enforcement of the federal right may be assured."

In *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 690, 701, the point was whether a federal question was or was not involved in the decision of the state supreme court, and this Court, at the latter pages, said:

> "But the federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment (citing cases and with approval the following excerpts): But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

In *Honeyman v. Hanan*, 300 U. S. 14, 18, 81 L. ed. 476, 479, involving the information of whether or not a federal question was presented for decision to the highest court of a state, at the latter pages this Court said:

> "As this court must decide whether it has jurisdiction in a particular case, this court must determine whether the federal question was necessarily passed upon by the state court. That

determination must rest upon an examination of the record. A certificate or statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling."

In *American Propelling Co. v. United States*, 300 U. S. 475, 478, 81 L. ed. 751, 754, in speaking of a principle applicable to the United States when it becomes a party to litigation when justice can be done without endangering any public interest, which we think applies here, at the latter pages this Court said:

> "If the principle just stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

In *Langnes v. Green*, 282 U. S. 531, 541, 75 L. ed. 520, 526, on Writ of Certiorari to the U. S. Circuit court of appeals reversing a decree of a U. S. district court concerning the wages of a seaman and the discretion of the lower court, at the latter pages said:

> "The term 'discretion' denotes the absence of a hard and fast rule (citing case using such language). When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law,

and directed by reason and conscience of the judge to a just result."

Respectfully submitted,

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